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No. 87-135

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PATTI AND PAUL ENSIGN,

Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Fourth District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court should decline to grant review in this case where petitioners did not advance the constitutional issues in the court below.
2. Whether petitioners' rights to due process and equal protection were violated when their parental rights were terminated upon a finding that their mental illness prevented them from discharging their parental responsibilities.
3. Whether petitioners' rights to due process and equal protection were violated where their parental rights were terminated upon a finding of unfitness based on clear and convincing evidence.
4. Whether petitioners' rights to due process and equal protection were violated where the court below found that there was clear and convincing evidence to support the finding of unfitness.

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RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

The order of the Illinois Appellate Court, Fourth District, is unpublished. *People v. Ensign*, ____ Ill. App. 3d ____, ____ N.E.2d ____ (4th Dist. 1986). The order has been submitted to this Court as Appendix C to the Petition for Writ of Certiorari and, therefore, is not contained in this Brief in Opposition.

JURISDICTION

The jurisdiction of this Court is not properly invoked under 28 U.S.C. § 1257(3).

STATEMENT OF THE CASE

Paul Ensign, Jr. was born on November 28, 1984, to petitioners, Patti and Paul Ensign, a mentally retarded couple. A petition for neglect, dependency, and for the termination of parental rights was filed in the Circuit Court for the Sixth Judicial Circuit, Moultrie County, Illinois, on July 8, 1985. A hearing was held on that petition in the circuit court. Subsequent to the hearing the court found, in an order of adjudication pursuant to section 2-4 of the Juvenile Court Act, Ill. Rev. Stat. 1985, ch. 37, § 702-4, that the minor was neglected and abused. The court also found, pursuant to section 2-5 of the Juvenile Court Act, Ill. Rev. Stat. 1985, ch. 37, § 702-5, that the minor was dependent. Thus, the minor was made a ward of the court pursuant to section 1-4 of the Juvenile Court Act, Ill. Rev. Stat. 1985, ch. 37, § 701-4(b). Finally, the court found, in its dispositional order, pursuant to section 5-9(2) of the Juvenile Court Act, Ill. Rev. Stat. 1985, ch. 37, § 705-9(2) and section 1 of the Adoption Act, Ill. Rev. Stat. 1985, ch. 40, § 1501 that petitioners were unfit parents. Petitioners' parental rights were terminated, the minor was removed from petitioners' custody, and the minor was placed in the custody and guardianship of the

Illinois Department of Children and Family Services with the guardian being granted the power to consent to the adoption of the minor.

Petitioners appealed to the Illinois Appellate Court, Fourth District. The appellate court affirmed the order of adjudication and the dispositional order of the circuit court in an unpublished order.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I.

THIS COURT SHOULD DECLINE TO GRANT REVIEW IN THIS CASE WHERE PETITIONERS DID NOT ADVANCE THE CONSTITUTIONAL ISSUES IN THE COURT BELOW.

The respondent respectfully requests this Court to deny the Petition for Writ of Certiorari to review the decision of the Illinois Appellate Court, Fourth District, insofar as petitioners failed to raise in the court below the constitutional issues now sought to be advanced. In seeking a writ of certiorari in this case, petitioners advance three reasons for granting the writ. However, the questions were neither advanced below by petitioners nor passed upon by the appellate court.

This Court's certiorari jurisdiction over decisions of state courts is derived from 28 U.S.C. § 1257 which provides that

> [f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

> (3) By writ of certiorari, . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties, or statutes of . . . the United States.

It is clear that this Court is vested with no jurisdiction unless the federal question had been both raised and decided in the state court below. "If both of these requirements do not appear on the record, the appellate jurisdiction fails." *Crowell v. Randell*, 10 Pet. 368, 392 (1836). Although the apparent rule of *Crowell* that the federal claim be both raised and decided in state court has not been strictly followed, this Court has not departed from the rule that a claim will not be considered unless it has been either raised or squarely considered and resolved in state court. *State Farm Mutual Automobile Insurance Co. v. Duel*, 324 U.S. 154, 160 (1945) ("since the [State] Supreme Court did not pass on the question, we may not do so.") In *Hill v. California*, 401 U.S. 801 (1971), this Court held that where counsel for Hill conceded at oral argument that the constitutional issue was neither raised at trial nor raised, briefed, or argued in the California appellate courts, the issue was not properly before this Court for review. Thus, this Court "cannot decide issues raised for the first time here." *Tacon v. Arizona*, 410 U.S. 351, 352 (1973).

In the case at bar, this Court lacks jurisdiction to review the decision of the state appellate court where petitioners failed to raise the federal issues now sought to be advanced. Rather, the petitioners argued that the evidence adduced at the hearing in the circuit court was inadequate under Illinois law to terminate their parental rights. Specifically, petitioners made the following arguments:

I.

THE STATE DID NOT PROVE THAT PAUL ENSIGN, JR., A MINOR CHILD, WAS NEGLECTED OR ABUSED UNDER ILLINOIS REVISED STATUTES, CHAPTER 37, SECTION 702-4(2).

II.

THE STATE DID NOT PROVE THAT PAUL ENSIGN, JR., A MINOR CHILD, WAS A DEPENDENT MINOR.

III.

THE STATE DID NOT PROVE THAT PAUL ENSIGN, SR. AND PATTI ENSIGN WERE UNFIT PARENTS BY CLEAR AND CONVINCING EVIDENCE.

A. THE STATE DID NOT PROVE THAT PATTI AND PAUL ENSIGN, SR. FAILED TO MAINTAIN A REASONABLE DEGREE OF INTEREST, CONCERN OR RESPONSIBILITY AS TO THE WELFARE OF PAUL, JR.

B. THE STATE FAILED TO PROVE THAT PATTI AND PAUL ENSIGN, SR. SUBSTANTIALLY NEGLECTED THEIR SON, REPEATEDLY.

C. THE STATE DID NOT PROVE THAT PATTI AND PAUL ENSIGN, SR. FAILED TO PROTECT THEIR SON FROM CONDITIONS WITHIN HIS ENVIRONMENT THAT WERE INJURIOUS TO HIS WELFARE.

D. THE STATE FAILED TO PROVE BY CLEAR AND CONVINCING EVIDENCE THAT PATTI AND PAUL ENSIGN, SR. DID NOT DEMONSTRATE A REASONABLE DEGREE OF INTEREST, CONCERN OR RESPONSIBILITY AS TO THE WELFARE OF A NEWBORN CHILD DURING THE FIRST THIRTY DAYS OF BIRTH.

E. THE STATE DID NOT PROVE BY CLEAR AND CONVINCING EVIDENCE THAT PATTI AND PAUL ENSIGN, SR. WERE UNABLE TO DISCHARGE THEIR PARENTAL RESPONSIBILITIES DUE TO MENTAL RETARDATION.

(Brief and Argument for Appellant at 1-4) Where petitioners only presented the above claims in the court below and failed to raise the constitutional issues, this Court should deny review of the questions now sought to be presented.

II.

PETITIONERS' RIGHTS TO DUE PROCESS AND EQUAL PROTECTION WERE NOT VIOLATED WHEN THEIR PARENTAL RIGHTS WERE TERMINATED UPON A FINDING THAT THEIR MENTAL ILLNESS PREVENTED THEM FROM DISCHARGING THEIR PARENTAL RESPONSIBILITIES.

Petitioners initially argue that their rights to due process and equal protection were violated when their parental rights were terminated without a finding of either fault or intentional neglect or abuse of their child. (Petition for Writ of Certiorari at 6) They contend that this procedure results in termination based solely on their status of being mentally ill. Petitioners make this proposition without any direct authority.

Respondent agrees that a parent's rights cannot be terminated solely due to his or her mental retardation or illness. If, however, the mental illness or other mental or emotional disability precludes that parent from providing proper parental care and defeats all reasonable efforts to remedy the condition which led to a determination that a parent is unfit, then termination is appropriate.

Ill. Rev. Stat. 1985, ch. 40, § 1501(D)(p). Under this statutory scheme, there is no violation of due process or equal protection where termination of parental rights can result only when the parent's mental illness manifests itself in conduct demonstrating a present and future inability to care for the child. It is the parent's conduct and relationship with the child, not the parent's status, that forms the basis for terminating parental rights. *In re Guardianship and Custody of Nereida S.*, 57 N.Y.2d 636, 439 N.E. 2d 870 (1982).

In the case at bar, petitioners' parental rights were not terminated because of their mental illness, but rather because their mental illness precluded them from providing proper parental care. The record demonstrated that petitioners were unable to give proper physical or emotional care to their child even with extensive assistance and guidance and thus were unable to discharge their parental responsibilities. There was clear and convincing proof that petitioners' mental disability was directly related to deficient parenting. The lower court stated:

> The undisputed evidence, as presented by the psychologists and the other trained professionals who were involved in this case, is that [petitioners'] conditions of severe mental impairment will not be alleviated in the foreseeable future. The minor is at high risk for developmental delay and retardation, and these conditions are likely to manifest themselves in the future, thereby increasing the amount of care the minor will need. As the [petitioners'] parenting skills remain static and the minor's need for care and stimulation increases, [petitioners'] abilities to discharge their responsibilities would consequently be diminished even further.

(Appendix to Petition for Writ of Certiorari at 15c)

The statutory scheme provided sufficient procedural safeguards for the protection of petitioners' parental rights and authorized the termination of petitioners' rights only when specific criteria were satisfied. The statute does not violate petitioners' rights to due process and equal protection since termination can only result from a specific finding of unfitness made subsequent to a hearing. Where petitioners' parental rights were terminated based upon a finding of unfitness due to their conduct, rather than their status as persons with mental illness, this Court should deny further review of this cause.

III.

THIS COURT SHOULD DENY REVIEW OF THE CLAIM THAT PETITIONERS WERE DENIED DUE PROCESS AND EQUAL PROTECTION WHEN THE STATE TERMINATED THEIR PARENTAL RIGHTS WITHOUT CONSIDERING WHETHER THE STATE'S INTEREST COULD BE PROTECTED BY OTHER, LESS INTRUSIVE ALTERNATIVES WHERE THEY FAILED TO ADVANCE THE CLAIM BELOW.

Petitioners further claim that the constitutional requirement of due process and equal protection was not met when the State terminated petitioners' parental rights without considering whether the State's interest could be protected by other, less intrusive alternatives. (Petition for Writ of Certiorari at 9-11) Respondent maintains this Court should deny review of this claim where petitioners failed to advance any claim, constitutional or otherwise, with respect to whether petitioners' parental rights could be terminated without a finding that the State's interest could not be protected by other, less intrusive alternatives. Because of this failure to specifically raise the claim below, the court had no reason to address the issue in

its order affirming the judgments of the circuit court. This Court should decline to grant petitioners initial review of the contention.

Notwithstanding petitioners' failure to advance the claim below, the record amply demonstrates that alternatives to the termination of petitioners' parental rights were tried, but that the alternatives failed to ameliorate the situation. Although petitioners received assistance in learning parenting skills from health care professionals, petitioners failed to retain these skills even with repetition. Although the liberty interest in maintaining a familial relationship with one's child is indeed fundamental, *Stanley v. Illinois*, 405 U.S. 645 (1972), the circuit court had no available option other than the termination of petitioners' parental rights when these efforts to assist petitioners failed. This Court should decline to provide further review of this cause where there was substantial evidence to support the determination of the court below affirming the judgment of termination.

IV.

PETITIONERS' RIGHTS TO DUE PROCESS AND EQUAL PROTECTION WERE NOT VIOLATED WHERE THE COURT BELOW FOUND THAT THERE WAS CLEAR AND CONVINCING EVIDENCE TO SUPPORT THE FINDING OF UNFITNESS.

It is well settled and the respondent fully acknowledges that due process requires that before parental rights may be terminated, the State must demonstrate the parents are unfit by at least clear and convincing evidence. *Santosky v. Kramer*, 455 U.S. 748, 769 (1982). This Court in *Santosky* stated that this standard is necessary to convey to the factfinder the level of certainty about its fac-

tual conclusions necessary to satisfy due process. *Id.* The lower court in the case at bar held that the trial court's findings of parental unfitness were supported by clear and convincing evidence. (Appendix to Petition for Writ of Certiorari at 15c-16c) Petitioners seek review by this Court where they argue that

> [t]he State violated these Petitioners' due process and equal protection rights through its finding of unfitness and termination of these Petitioners' parental rights without the necessary clear and convincing evidence to support those decisions.

(Petition for Writ of Certiorari at 13) Respondent maintains the Petition for Writ of Certiorari should be denied where the issue involves a question as to the particular application of well-defined decisional law of this Court to the facts of the case. Further review of this cause is unnecessary since the decision below does not depart from established precedent. The court below fully considered the claim in view of the constitutional standard and correctly decided the issue.

Pursuant to section 5-9(2) of the Juvenile Court Act (Ill. Rev. Stat. 1985, ch. 37, § 705-9(2)), the court may terminate parental rights upon finding that the parents are unfit as defined in section 1D of the Illinois Adoption Act (Ill. Rev. Stat. 1985, ch. 40, § 1501(D)), which provides, in pertinent part, as follows:

> D. 'Unfit person' means any person whom the court shall find to be unfit to have a child, without regard to the likelihood that the child will be placed in adoption, the grounds of such unfitness being any one or more of the following:
>
> * * *

(b) failure to maintain a reasonable degree of interest, concern or responsibility as to the child's welfare;

* * *

(d) substantial neglect of the child if continuous or repeated;

* * *

(g) failure to protect the child from conditions within his environment injurious to the child's welfare;

* * *

(l) failure to demonstrate a reasonable degree of interest, concern or responsibility as to the welfare of a new born child during the first 30 days after its birth;

* * *

(o) repeated or continuous failure by the parents, although physically and financially able, to provide the child with adequate food, clothing, or shelter;

(p) inability to discharge parental responsibilities supported by competent evidence from a psychiatrist or clinical psychologist of mental impairment, mental illness or mental retardation as defined in Section 1-116 of the Mental Health and Developmental Disabilities Code, or developmental disability as defined in Section 1-106, of that Code, and there is sufficient justification to believe that such inability to discharge parental responsibilities shall extend beyond a reasonable time period.

The trial court entered a finding of parental unfitness pursuant to subsections (b), (d), (g), (l), (o) and (p) of section 1D of the Adoption Act (Ill. Rev. Stat. 1985, ch. 40, §§ 1501D(b), (d), (g), (l), (o), (p)).

The trial court's findings of unfitness were premised upon the following facts: Petitioner's father dropped the child at the age of eleven or twelve days, and petitioners

took no action on their own to attend to the child's physical condition. Although repeatedly instructed regarding the proper feeding and hygiene of the child, petitioners were unable to master these basic tasks. Petitioners left dangerous objects such as medication within the reach of the child and petitioners failed to comprehend that this could be dangerous to the child. In the opinion of the testifying psychologists, petitioners were unable to recognize and appropriately respond to medical emergencies which may arise. Finally, petitioners were unable to provide appropriate emotional and physical stimulation for the child.

The trial court was confronted with a most difficult factual situation and reached its decision with sensitivity and concern. After careful consideration, the court found the petitioners to be unfit parents and terminated their parental rights. The decision was supported by clear and convincing evidence and no error is present which would warrant further review by this Court.

CONCLUSION

In view of the foregoing reasons, respondent respectfully requests this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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